

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 427 – Award No. 427 – Claimant: Gabaldon
Carrier File No. 14-12-0078
Organization File No. 150-13D3-115.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing November 18, 2011, when Claimant, Eric J. Gabaldon (3946787), was disqualified off position of welder. The Carrier alleged he did not possess the ability, fitness and skills to handle the position in a safe and efficient manner.
2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate his Welding rights, with seniority, vacation, all rights commencing November 18, 2011, continuing forward and/or otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Eric J. Gabaldon, has been employed by the Carrier as a Welder since 2004. On November 18, 2011, the Carrier, by letter, notified Claimant had he had been disqualified effective close of shift that day. The letter stated that it had been determined that Claimant did not possess the ability, fitness and skills to handle the position in a safe and efficient manner. On November 21, 2011, the Organization requested a formal investigation in accordance with Rule 13 of the parties' agreement, and the Carrier issued an investigation notice the next day. On January 9, 2012, following the investigation, the Carrier issued a letter informing Claimant that his welder rights would not be reinstated.

Carrier Roadmaster Mark Roybal testified that he supervised Claimant and his co-worker, Welder Carrasco, at the time of the relevant events. He issued the disqualification notice to Claimant. Mr. Roybal stated that on or about October 18, 2012, an FRA audit found violations on the frog at Suwanee, milepost 47.15 Main 2, a location where Claimant and Mr. Carrasco had been working. The audit document was entered into evidence at the investigation. It stated that the tread portion of frog was worn in excess of what was allowable, the tread was worn ½ inch, and ground marks on the frog indicated that work had been performed recently and the tread was left worn/low. Mr. Roybal explained that the FRA issued violations for worn tread portion and recently performed ground work. Mr. Roybal stated that the employees should have pulled a straight edge and ensured that everything was up to standard before they left.

Mr. Roybal continued that following the inspection the FRA briefed him and indicted that they would return to perform a re-inspection. Mr. Roybal stated that he briefed his employees, and, on or about November 5, 2011, Supervisor of Welding Lynn Ludwig came to the job location and briefed Claimant and Mr. Carrasco. Mr. Roybal also briefed with his Track Supervisor daily to make sure all of the welders' work was re-inspected.

Mr. Roybal testified that on November 18, 2011, he received a call from Track Supervisor Ira Ward and Virgin McLaughlin, informing him they had re-inspected the crossover at Felipe Main 2. They told him that the Welders, apparently Claimant and Mr. Carrasco, had been there all day and had been instructed to work on both frogs on Main 2, but the frogs were left low and another 10 mile-per-hour limit had to be put in place to protect the service of the railroad.

Mr. Roybal stated that he traveled to the location the next day and took photographs, which were entered into evidence at the investigation. The Organization noted for the record that none of the photographs had any identifying information to tie them to the location at issue. Mr. Roybal detailed the defective work shown in the photographs, including plates that were not welded, frog bolts had not been put in, gap from the tread to the radius gauge, straight edge pulled out and other items were not repaired. He stated that these exceptions were noted at both crossovers on Felipe Main 2, and the photographs were taken at both locations.

Mr. Roybal stated that he expects his welders to follow Engineering Instructions 11.4.2, Inspecting Frogs and Crossings, and 11.4.3, Ensuring Safe Train Movement. He explained that during his morning conference call, apparently on November 17, 2011, he stated that Claimant and Mr. Carrasco were to work on both frogs on Main 2 at Felipe, using Form B as protection. The inspections determined that the work Claimant and his co-worker performed did not meet specifications for over 10 miles per hour.

Mr. Roybal stated that he never received a call from Claimant or his co-worker indicating that they were unable to complete the assigned frog work, or that the frog was not repaired and the employees needed more time; he stated that they took it upon

themselves to pack up and leave. Mr. Roybal added that following the FRA audit he informed the employees that if they needed more time to communicate that to him or the Track Superintendent. He added that he was unaware that two other welders worked at Felipe in conjunction with Claimant and his co-worker at any relevant times.

Mr. Roybal explained that after the FRA inspection, and the unsafe condition discovered on November 18, 2011, he thought it necessary to prevent Claimant and his co-worker from welding.

Claimant testified at the investigation that on November 16, 2011 he was originally assigned to a bridge panel project, which was canceled, so Mr. Ward asked him and Mr. Carrasco to go to Felipe Main 2, but was not sure which frog was the worst. Claimant stated that he received a call from other welders and, when he told them he was going to Felipe, the other welder told him he was on his way there and would help work on one of the frogs. The other welders arrived at Felipe first and set up on the west crossover frog, so the two groups briefed and Claimant told them he would get track and time.

Claimant stated that he and Mr. Carrasco then went to the east crossover and, although he had requested an hour and a half of track and time, the dispatcher only gave him 25 minutes. He stated that in that time they ground out the portion of the wing and repaired the hole, and then called and asked the dispatcher for more time but he said no, they would have to wait for two or three more trains. He stated that Mr. Carrasco called Mr. Ward and apprised him of the situation, and Mr. Ward asked if the frog was in good enough shape that he could put out a 10 mile per hour for a Form B for the next day. Carrasco told Mr. Ward it was okay for train traffic so long as they could return the next day to finish. He stated that Mr. Ward told him he would check with Mr. Roybal, and then called back and told them the Form B would be in place.

Claimant testified that he had a Form B for the east crossover the next day, November 17, 2011. He stated that the other two welders had performed a maintenance grind on the west crossover while he and Mr. Carrasco were on the east crossover with their 25 minutes of track and time. He stated that when the other welders left they gave him no indication of any problem and just stated that next time he needed maintenance grinding to just give them a call.

With respect to the repair of the east crossover, Claimant stated that when they arrived on November 17, 2011 the Form B began at 10 a.m. and they determined that the frog was approximately a quarter inch low on the point and had a severe crack in the point about an inch down and about 18 inches back. He stated that Mr. Carrasco called Mr. Ward and told him they would need to run trains at 10 miles per hour to protect the traffic over this frog because of the amount of material they needed to cut out, and it was going to take them all day to make this repair.

Claimant maintained that they made the repair successfully, and when he and his co-worker left the location the frog was "good to go." Claimant stated that it was his

understanding in this territory that an employee working on a frog is required to inspect within a 200-foot distance, and he examined that distance before he left the area.

Claimant's co-worker, Welder Joe R. Carrasco, testified at the investigation that on November 16, 2011 he told Mr. Ward that he needed to put out a Form B for the area where they were working. He explained that there were two separate welder teams working two different frogs that day; he and Claimant were on the east crossover and the other team was on the west. He was not able to secure track and time authority, except to do a small job. They completed that job, and he called Mr. Ward to request a Form B for the next day, and Mr. Ward agreed and told him to cut loose.

Mr. Carrasco stated that when the other welders, Mr. Lucas and Mr. Jesus, left they did not inform him that the west end frog was in bad shape; all they stated was that the next time he and Claimant needed someone to grind frogs they should let him know. He maintained that he and Claimant had no indication from the other employees that anything was wrong with the other frog.

Mr. Carrasco stated that the next day, November 17, 2011, he called Mr. Ward and explained that he would be running trains at reduced speed due to the number of frogs that needed to be taken out. He stated that he told Mr. Ward it would take every minute of their Form B authority to accomplish the repairs.

Mr. Carrasco testified that after he went home that day, he received a call from Welder Chad David, who told Mr. Carrasco he had been called out to work at Felipe. After attempting to reach Mr. Ward, Mr. Carrasco called Mr. David back and asked which frog he was working at, because he and Claimant had worked the east frog, and Mr. David told him it was the west crossover. Mr. Carrasco stated that he did not think anything of it, because he and Claimant had not been to the west crossover at all.

Mr. Carrasco acknowledged that his instructions were to go to Felipe to work on Main 2, not any particular crossover. He also acknowledged that there were two frogs in that area. He stated that when they finished work on November 16, 2011 they knew the east crossover still need work, but they had no idea of the condition of the west crossover. However, he maintained, he had no reason to believe the other welders had not done their job.

Claimant and Mr. Carrasco both denied that they had even been briefed by either the FRA Inspector or Mr. Roybal as to the condition of the frogs in the area.

At the conclusion of the hearing, the Organization representative read into the record three statements. The first was an e-mail from an individual named Nasario Noriega, stating that Claimant and Mr. Carrasco had worked for him as welders and he had no issues with their work and had never had reason to doubt their ability to perform their jobs. The second statement was from Track Supervisor Erwin Salazar, who also stated that he had worked with the two men, who had both shown a great deal of knowledge and pride in their jobs, and had never shown they were incapable of

performing their duties. The third statement was from Southwest Division Safety Assistant B.J. Grego, who stated that the two employees had approached him on several occasions to question and verify safe work practices.

The Carrier states that there is no merit to the Organization's contention that it failed to comply with Rule 13 and Appendix 11, as Claimant received a fair and impartial investigation, and the notice was issued within the required time limits once Claimant received the disqualification letter and requested an investigation. The notice included enough information for Claimant and his representative to prepare a defense, the investigation was scheduled and held as required and the letter stating that Claimant's Welder rights would not be reinstated was issued within the specified period of time following the investigation. All procedural requirements, the Carrier states, were met.

Moreover, the Carrier states, contrary to the Organization's assertions, Claimant was not disciplined. He was disqualified, and lost no compensation, so there are no monetary damages.

On the merits, the Carrier asserts that Claimant's disqualification was the result of his leaving a job site with FRA defects, a frog not repaired to standard, and a 10 mile-per-hour slow order. The Carrier notes the testimony of Roadmaster Roybal that he discussed this matter with Claimant and instructed him to call if he needed more time to complete a repair. Leaving matters as they were was not an option for Claimant, and it is fortunate that his attitude did not result in a catastrophe, but the potential for one was there. The Carrier concludes that the disqualification was warranted and the claim should be denied.

The Organization first states the Carrier did not comply with Rule 13 of the parties' agreement. On the merits, the Organization asserts that the Carrier did not present persuasive evidence to support its disqualification of Claimant as a welder. The Organization points to written statements from Track Supervisors Noriega and Salazar, who were familiar with Claimant's work, stating that Claimant had never given them any reason to doubt his ability.

With respect to the incident that led to the disqualification, the Organization states that Claimant's original assignment was thermite welding on a bridge panel project. That project was canceled, and Track Supervisor Ward redirected Claimant and his welding partner to the main two crossovers at Felipe. Mr. Ward was not sure which frog was in worse condition.

The Organization maintains that Claimant then received a call from welders in Grants, New Mexico, who had been on site to assist with the aborted bridge project, and the two work groups agreed that each group would set up on one of the frogs at Felipe and work in tandem. Claimant obtained authority to occupy the track and began work, but was unable to secure additional time to complete the work. The Track Supervisor was advised of the situation, and it was agreed that a Form B would be put out for the

location the following day. The second crew never mentioned that their frog needed additional work.

The Organization asserts that Claimant and his welding partner worked only on the east crossover frog at Felipe, as demonstrated by payroll records the Organization was unfortunately unable to obtain until after the hearing. The Organization notes that it objected strenuously to the Carrier's evidence, especially photographs, as there was nothing to link them to the location at issue.

The Organization disputes the Carrier's conclusion that Claimant left an FRA violation unprotected at the west crossover at Felipe. Claimant, the Organization stresses, never worked at that location and rather worked at the east crossover. Moreover, the Carrier states, the distance between the two locations is 290 feet, clearly outside the 200 foot radius Claimant was required to inspect.

The Organization concludes that Claimant committed no offense for which he should have been disqualified. The Organization urges that the discipline assessed is arbitrary, excessive and unwarranted, and requests that the claim be allowed.

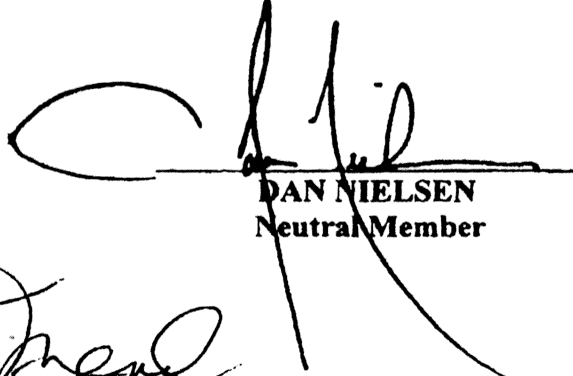
The Board has carefully reviewed the record in its entirety. It is well settled that the Carrier has the right to determine employee qualifications, and such determinations should not be disturbed by the Board unless they were made in an arbitrary manner. There is no such showing here.

The record indicates that on the occasion which led to the disqualification Claimant and his co-worker were instructed to go to a designated area, where there were two frogs, to perform repairs. Their testimony is that they apparently took it upon themselves to allow another crew to work on the one of the frogs, and, even though they were allotted a very short period of time, not enough for their own repairs, they assumed that the other crew left the west frog in acceptable condition. An inspection by Carrier management determined that both frogs were in unacceptable condition even after Claimant had been granted a substantial period of time the following day to complete his work and maintained that it was complete.

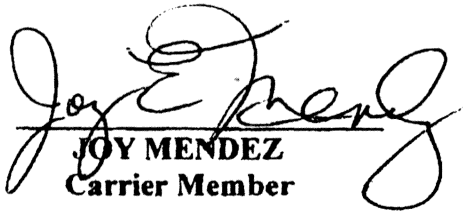
Claimant's conduct raises two issues. First, he did not take responsibility for fulfilling all of his job duties by making sure both frogs were in acceptable condition; it is no defense to state that he relied upon the report of the other crew. Second, even for the frog he undertook to repair, he apparently believed he had repaired it to an acceptable level even though it was left in such a condition that another team had to be dispatched to remedy the situation. That, coupled with the Carrier's evidence that Claimant's previous work had led to FRA violations and he had been briefed on the need to improve the quality of his work, is sufficient to demonstrate that the Carrier had a legitimate, non-arbitrary basis for determining that Claimant lacked sufficient skill to perform his duties in a safe and acceptable manner. Written statements from individuals not involved in these incidents are not sufficient to warrant a contrary conclusion. We see no reason to overturn the Carrier's determination.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member



JOY MENDEZ
Carrier Member



DAVID TANNER
Organization Member

Dated this 15th day of October, 2013.